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**Attorney Docket No.: 30128/32000**

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**(SUBSTITUTE) APPEAL BRIEF**

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**(C) Real Party in Interest**

The real party in interest in the application on appeal, United States Patent Application No. 09/652,927, is the assignee, Tuf-Tite, Inc., an Illinois corporation, located at 550 Capitol Drive, Lake Zurich, Illinois, 60047. The assignment to Tuf-Tite, Inc. was recorded at Reel/Frame 011069/0546.

**(D) RELATED APPEALS AND INTERFERENCES**

None.

**(E) STATUS OF CLAIMS**

Claims 1-6 and 15-23 are pending. Claims 7-14 and 24-27 are cancelled. Claims 1-6 and 15-23 are the claims appealed.

**(F) STATUS OF AMENDMENTS**

No amendments were filed subsequent to the final rejection mailed June 8, 2005.

Appellant filed a Response to Final Office Action on December 8, 2005, with a Fourth Affidavit of Theodore W. Meyers Under 37 CFR § 1.132, presenting additional consistent evidence of commercial success. An Advisory Action mailed December 27, 2005 indicated entry of the Fourth Affidavit of Theodore W. Meyers Under 37 CFR § 1.132 was refused.

## **(G) SUMMARY OF CLAIMED SUBJECT MATTER**

### **A. Claims**

Claim 1 is directed to a tee (10) for use at the inlet or outlet of a septic tank, which tee (10) comprises an elongated generally cylindrical injection molded plastic main body portion (24) defining a tubular opening. Page 12, line 26-page 13, line 7; page 17, lines 3-5; page 22, lines 21-22; page 26, lines 3-4. The tubular opening is adapted to receive a filter therein. Page 13, lines 5-7; page 17, lines 11-18. The tee (10) includes a cylindrical injection molded plastic uppermost hub (30), coaxial with the elongated main body portion (24). Page 13, lines 10-15. The uppermost hub (30) has an inner diameter greater than the diameter of the elongated main body portion. The tee is further provided with an inlet/outlet port (36) in communication with the tubular opening. Page 13, lines 21-23. The inlet/outlet port (46) has an inlet/outlet hub at an open end, which has a diameter sized to receive a pipe having a first outer diameter, page 19, lines 1-4, and the inlet/outlet hub is adaptable, such that it can receive a pipe having a second outer diameter. Page 18, lines 2-7; page 25, lines 3-4. The diameter of the inlet/outlet hub is greater than the diameter of the elongated main body portion (24).

Claim 4 depends from claim 1 and adds a sweep portion (134) arcing upwardly from the elongated main body portion (24) toward a ring defined by the inlet/outlet hub. Page 25, lines 1-3.

Claim 19 depends from claim 4 and adds that the outlet opening of the inlet/outlet port (36) is located nearer to the uppermost hub (30) than a lowermost end of the tee.

Claim 20 depends from claim 19, and adds an effluent filter (16) received in the tubular opening of the tee. Claim 20 also adds that the lowermost end of the tee extends into a clear zone of a septic tank when the tee (10) is mounted at the septic tank outlet.



Claim 5 depends from claim 1 and adds at least two horizontal reinforcement ribs (180) on an outer wall of the elongated main body portion (24).

Claim 6 depends from claim 1 and adds a reducer bushing (64, 164) securely received in the inlet/outlet port. The reducer bushing (64), (164) is used to adapt the diameter of the inlet/outlet port to receive a pipe having a different (i.e., second) outer diameter.

Claim 21 depends from claim 1 and adds first and second injection molded plastic ribs (160) extending generally longitudinally along the elongated injection molded plastic main body portion of the tee.

Claim 2 depends from claim 21 and adds that the first and second injection molded plastic ribs (160) extend outwardly from an outer wall of the elongated injection molded plastic main body portion and the uppermost hub.

Claim 3 depends from claim 2 and adds seams coextending with the first and second ribs.  
Page 19, lines 7-8.

Independent claim 15 is directed to a one-piece sanitary tee baffle (10) which comprises an elongated generally cylindrical injection molded plastic main body portion (24) defining a tubular opening. Page 12, line 26-page 13, line 7; page 17, lines 3-5; page 22, lines 21-22; page 26, lines 3-4. The tubular opening is adapted to receive a filter therein. Page 13, lines 5-7; page 17, lines 11-18. The tee (10) includes a cylindrical injection molded plastic uppermost hub (30), coaxial with the elongated main body portion (24). Page 13, lines 10-15. The uppermost hub (30) has an inner diameter greater than the diameter of the elongated main body portion. The tee is further provided with an inlet/outlet port (36) in communication with the tubular opening. Page 13, lines 21-23. The inlet/outlet port (46) has an inlet/outlet hub at an open end, which has a diameter sized to receive a pipe having a first outer diameter, page 19, lines 1-4, and the

inlet/outlet hub is adaptable, such that it can receive a pipe having a second outer diameter. Page 18, lines 2-7; page 25, lines 3-4. The diameter of the inlet/outlet hub is greater than the diameter of the elongated main body portion (24). Claim 15 also recites first and second ribs (160) extending generally longitudinally along the elongated main body portion (24). Page 24, lines 19-21. Claim 15 further recites that the generally cylindrical injection molded plastic main body portion has a wall thickness between 0.075" and 0.100" over a substantial portion thereof. Page 16, lines 9-12; page 25, lines 7-8.

Claim 16 depends from claim 15 and adds an effluent filter (16) received in the tubular opening of the tee.

Claim 17 depends from claim 15 and adds a length of pipe received in the inlet/outlet hub.

Claim 18 depends from claim 17 and adds a reducer bushing (64), (164) between the inlet/outlet hub and the length of pipe. The reducer bushing is used to adapt the diameter of the inlet/outlet hub to receive a pipe having a different (i.e., second) outer diameter.

Claim 22 depends from claim 15 and adds the wall thickness of the elongated generally cylindrical main body portion is about 0.090". Page 16, line 13; page 25, line 8.

Independent claim 23 is directed to a tee (10) which comprises an elongated generally cylindrical injection molded plastic main body portion (24) defining a tubular opening. Page 12, line 26-page 13, line 7; page 17, lines 3-5; page 22, lines 21-22; page 26, lines 3-4. The tubular opening is adapted to receive a filter therein. Page 13, lines 5-7; page 17, lines 11-18. The tee (10) includes a cylindrical injection molded plastic uppermost hub (30), coaxial with the elongated main body portion (24). Page 13, lines 10-15. The uppermost hub (30) has an inner diameter greater than the diameter of the elongated main body portion. The tee is further

provided with an inlet/outlet port (36) in communication with the tubular opening. Page 13, lines 21-23. The inlet/outlet port (46) has an inlet/outlet hub at an open end, which has a diameter sized to receive a pipe having a first outer diameter, page 19, lines 1-4, and the inlet/outlet hub is adaptable, such that it can receive a pipe having a second outer diameter. Page 18, lines 2-7; page 25, lines 3-4. The diameter of the inlet/outlet hub is greater than the diameter of the elongated main body portion (24). Claim 23 also recites that the tee (10) has at least one horizontal reinforcing rib (180) on an outer wall of the elongated injection molded plastic main body portion. Page 25, lines 10-13.

B. Drawing Figures

Figure 2 of the present application on appeal, reproduced at Appendix L-I, is representative of the claimed tee and reducer bushing.

Figure 1 of the present application on appeal, reproduced at Appendix L-II, is representative of the claimed tee having an effluent filter received therein, and shows the lowermost end of the tee extending into the clear zone of a septic tank.

**(H) GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

Whether claims 1, 4, 6 and 19 are unpatentable under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632.

Whether claims 1-5, 19, 21 and 23 are unpatentable under 35 U.S.C. § 103 over Ramm, U.S. Patent No. 3,633,943, in view of Carrow, U.S. Patent No. 4,690,632.

Whether claims 2, 15, 17, 18, 21 and 22 are unpatentable under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632, and further in view of Wyre, U.S. Patent No. 1,052,198.

Whether claim 6 is unpatentable under 35 U.S.C. § 103 over Ramm, U.S. Patent No. 3,633,943, in view of Carrow, U.S. Patent No. 4,690,632, and further in view of Morrison, U.S. Patent No. 901,545.

Whether claim 16 is unpatentable under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632 and Wyre, U.S. Patent No. 1,052,198, and further in view of Pinion, U.S. Patent No. 4,798,028.

Whether claim 20 is unpatentable under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632, and further in view of Pinion, U.S. Patent No. 4,798,028.

## (I) ARGUMENT

### Introduction

References may not be combined to support an obviousness rejection without the presence of a proper motivation or suggestion to combine them in the proposed manner, and when objective evidence of secondary considerations of non-obviousness is presented, it must be considered. If no prima facie case of obviousness is established, or if sufficient evidence to rebut a prima facie case is submitted, a rejection under 35 U.S.C. § 103 is improper. These fundamental doctrines have been cast aside in the examination of the application on appeal.

#### **I. REJECTION OF CLAIMS 1, 4, 6 AND 19 UNDER 35 USC § 103(a) AS UNPATENTABLE OVER MORRISON, U.S. PAT. NO. 901,545, IN VIEW OF CARROW, U.S. PAT. NO. 4,690,632**

##### **A Prima Facie Case of Obviousness of Claims 1, 4, 6 and 19 Has Not Been Established**

The procedural framework for obviousness rejections is discussed in numerous decisions of the Federal Circuit:

An obviousness determination is based on underlying factual inquiries including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) objective evidence of nonobviousness.

*In re Dembiczak*, 175 F.3d 994, 998, 50 USPQ2d 1614, 1616 (Fed. Cir. 1999) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966)).

The examiner bears the burden of establishing a *prima facie* case of obviousness. Only if this burden is met does the burden of coming forward with rebuttal argument or evidence shift to the applicant. When the references cited by the examiner fail to establish a prima facie case of obviousness, the rejection is improper and will be overturned.

*In re Deuel*, 51 F.3d 1552, 1557, 34 USPQ2d 1210, 1214 (Fed. Cir. 1995), citations omitted. If a prima facie case of obviousness has not been established, the rejection of claims 1, 4, 6 and 19 cannot stand. The primary reference in the rejection is non-analogous art, and even if analogous,

the proposed combination does not result in what is claimed. Thus, the rejection should be reversed.

Claims 1, 4, 6 and 19 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632. According to the final Office action, Morrison discloses a tee comprising a cylindrical main body portion defining a tubular opening adapted to receive a filter, a cylindrical uppermost hub coaxial with the main body portion, the uppermost hub including an inner diameter greater than the diameter of the cylindrical main body portion, an inlet/outlet port in communication with the tubular opening, an inlet/outlet hub located at an open end of the port, and having a diameter sized to receive a pipe. The final Office action further indicates Morrison shows the diameter of the inlet/outlet hub is greater than the diameter of the cylindrical main body portion, and the inlet/outlet port is adapted to receive a pipe.

A. Lack of Teachings or Suggestions in Morrison/Carrow

As explained in Part III, *infra*, Morrison is non-analogous art and should not be relied upon to support the Section 103 rejection. However, even assuming *arguendo* the teachings of Morrison were applicable to the Applicant's field of endeavor or the problem to be solved; the final Office action mischaracterizes Morrison as disclosing a tubular opening adapted to receive a filter. Nowhere in Morrison is there any disclosure or suggestion of the tubular opening of the metal tee of Morrison being adapted to receive a filter.

The final Office action concedes that Morrison fails to disclose a tee made of an injection molded plastic. The action relies upon Carrow for teaching that it is well known in the art that injection molded plastic is used to produce tubular articles, such as pipes and pipe-fittings. According to the action, it would have been obvious to one having ordinary skill in the art at the time the invention was made to produce the tee presented by Morrison of an injection molded

plastic, since the selection of a known material based upon its suitability for the intended use is a design consideration within the level of skill of one skilled in the art. The final Office action additionally proffers two potential motivations for combining the references in the proposed manner, namely to offer certain advantages over metal pipes or metal pipe-fittings, like corrosion resistance, and potentially lower material and production costs.

B.       Rejection of Claim 1 –  
          Proposed Combination of Morrison With Carrow Does Not Result in Claim 1

The final Office action fails to acknowledge that, even when combined with Carrow in the proposed manner, the tee of Morrison made of injection molded plastic does not result in the Applicant's claim 1. Claim 1 recites "said inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outer diameter". Conspicuously absent from the Office action's explanation of the alleged relevance of Morrison is any mention of the language recited in Applicant's claim 1 concerning the inlet/outlet hub having a diameter sized to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a *second* outer diameter.

To the contrary, the final Office action describes Morrison as teaching an inlet/outlet port "having a diameter sized to receive a pipe" and, in the same paragraph, states that "[t]he inlet/outlet port is adaptable to receive a pipe." The pipe that the inlet/outlet port of Morrison is purportedly "sized to receive" and also "adaptable to receive" is only one outer diameter. Claim 1, on the other hand, recites that the inlet/outlet hub has a diameter sized so as to receive a pipe of a first outer diameter, and is adaptable to receive a pipe of a second outer diameter, *i.e.* a pipe having a different outer diameter than the first outer diameter.

Morrison does not disclose or suggest a tee for effluent filters which is adaptable to receive a pipe of a different diameter. Rather, Morrison teaches wholly different products,

namely slip-fit pipe fittings in sanitary plumbing tees connected in series, in which packing, such as oakum and lead for caulking, is applied around the exterior of one tee as it is placed in the hub of another tee. The Applicant's August 6, 2003 Supplemental Affidavit distinguished Morrison as follows:

6. With respect, I disagree with the statement in the Office Action that "Morrison teaches that it is known in the art to have a tee adapted to receive a pipe of a first or second outer diameter (by using a reducer as illustrated in Figure 8)." Morrison does not teach the use of a reducer. Rather, in Figure 8, Morrison shows a ring (a<sup>6</sup>) inserted in the hub to operate as a stop for the end of a succeeding tee, i.e. to avoid the presence of a slip joint, sealed by oakum and lead, within a pipe tee. **There is no teaching in Morrison of a pipe received inwardly of the ring (a<sup>6</sup>).** The vertical lines in the drawing of Figure 8 represent the interior of the ring, not part of a pipe. Since the ring is used as a stop, it would be directly contrary to the purpose of the ring (a<sup>6</sup>) in Morrison to have a pipe received inwardly of the ring (a<sup>6</sup>). A pipe received within the ring (a<sup>6</sup>) would have to be sealed within the ring with some type of caulk, such as the oakum and lead described in the specification of Morrison, thus introducing a slip joint, including caulk, into the soil pipe. Yet, this is exactly what Morrison expressly indicates is sought to be avoided by providing the ring (a<sup>6</sup>) in the first place.

Supplemental Affidavit of Theodore W. Meyers Under 37 C.F.R. §1.132, ¶ 6 (emphasis added).

In sum, Morrison does not disclose making an inlet/outlet port adaptable, by using a reducer or otherwise, to accept a pipe of a first diameter or a second diameter. Thus, as there is no suggestion or motivation in Morrison, the motivation must have been impermissibly gleaned from the Applicant's disclosure. This is hindsight reasoning and is impermissible. *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed.Cir.1983) ("To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher."). *See also In re Kotzab*, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1317-18 (Fed. Cir. 2000)("[A] rejection cannot be predicated on the mere identification ... of individual components of claimed limitations. Rather, particular findings must be made as to the reason the



skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed.”). The rejection of claim 1 should therefore be reversed.

C. Claim 6 Rejection -  
Morrison Does Not Disclose a Reducer

Claim 6 recites: “The tee of claim 1, in combination with a reducer bushing securely received in said inlet/outlet port.” Morrison does not disclose the use of a reducer bushing. According to the final Office action, Morrison discloses a “reducer” in Figures 1 and 8. However, according to Morrison, “a ring a<sup>6</sup> may be inserted in the hub to stop the end of the succeeding tee and the packing therefor as shown in Fig. 8.” Thus, the ring a<sup>6</sup> is not a reducer. Nor is the material shown above the ring a<sup>6</sup> in Fig. 8 a reducer bushing. Rather, the specification of Morrison describes this material as “oakum and lead for caulking.” Col. 2, lines 42-43. The rejection of claim 6 should therefore be reversed.

D. Claims 4 and 19 Rejections -  
Dependent Claims 4 and 19 Stand or Fall With Claim 1

As claim 4 depends from claim 1, and claim 19 depends from claim 4, these claims are allowable for at least the same reasons as claim 1. Therefore the rejection of these claims should also be reversed.

**II. REJECTION OF CLAIMS 1-5, 19, 21 AND 23 UNDER 35 USC § 103(a) AS UNPATENTABLE OVER RAMM, U.S. PAT. NO. 3,633,943, IN VIEW OF CARROW, U.S. PAT. NO. 4,690,632**

**A Prima Facie Case of Obviousness of Claims  
1-5, 19, 21 and 23 Has Not Been Established**

Claims 1-5, 19, 21 and 23 were rejected as unpatentable over Ramm, U.S. Patent No. 3,633,943, in view of Carrow, U.S. Patent No. 4,690,632. In the final Office action, Ramm is described as disclosing a tee comprising a cylindrical main body portion (2) defining a tubular

opening adapted to receive a filter. However, there is no teaching or suggestion of the pipe fitting of Ramm being adapted to receive a filter. Ramm is further described in the final Office action as disclosing that “a cylindrical uppermost hub (at 22 in Figure 1) is coaxially [sic.] with the cylindrical main body portion. The uppermost hub includes an inner diameter greater than the diameter of the cylindrical main body portion.” Reference number 22 of Figure 1 of Ramm (reproduced at Appendix L-3) actually identifies something different, namely flanges. *See* Ramm, Column 2, lines 15-16 (“The base 12 is also provided at spaced intervals with flanges 22”).

The final Office action also describes Ramm as disclosing “[t]he inlet/outlet port includes an inlet/outlet hub (at 22 near 8), located at an open end of the port, having a diameter sized to receive a pipe.” Just as in the rejection discussed in Section I.A, *supra*, based on Morrison, the Office action’s explanation of the alleged relevance of Ramm lacks any mention of the language recited in Applicant’s claims 1 and 23 concerning the inlet/outlet hub having a diameter sized to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a *second* outer diameter. This is due to the fact that Ramm does not disclose the recited feature of the inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter *and* being adaptable to receive a pipe of a second outer diameter. Thus, Ramm in view of Carrow does not result in what is recited in the Applicant’s claims 1 and 23, nor in the claims which depend from claim 1. This rejection should therefore be reversed.

**III. REJECTION OF CLAIMS 2, 15, 17, 18, 21 AND 22 UNDER 35 USC § 103(a) AS UNPATENTABLE OVER MORRISON, U.S. PAT. NO. 901,545, IN VIEW OF CARROW, U.S. PAT. NO. 4,690,632, AS APPLIED TO CLAIM 1, AND FURTHER IN VIEW OF WYRE, U.S. PAT. NO. 1,052,198**

**A Prima Facie Case of Obviousness of Claims 2, 15, 17, 18, 21 and 22 Has Not Been Established**

Claims 2, 15, 17, 18, 21 and 22 were rejected as unpatentable under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632, as applied to claim 1, and further in view of Wyre, U.S. Patent No. 1,052,198. The arguments set forth above as to why Morrison in view of Carrow fail to render claim 1 obvious apply equally to claims 2, 15, 17, 18, 21 and 22. In addition, there is no suggestion in Morrison, Carrow or Wyre to combine these multiple references in the proposed manner. According to the final Office action, the proffered motivation to combine the references is "in order to strengthen the pipe fitting." However, the Applicant's claimed injection molded plastic tee for use at the inlet or outlet of a septic tank, in conjunction with effluent filters, is not a pipe fitting.

A person of ordinary skill in the art, seeking to manufacture an injection molded plastic part for use at the inlet or outlet of a septic tank would not look to cast iron plumbing connections or cast metal culvert half pipes, alone or in combination with one another, for a solution. It is therefore respectfully submitted that the Morrison and Wyre references are non-analogous, and therefore too remote to be treated as prior art in a rejection under 35 U.S.C. § 103. *In re Clay*, 966 F.2d 656, 658, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992). Not only is the art non-analogous, but the proffered motivation does not even relate to the claimed invention. Rather, the proffered motivation relates to a pipe fitting. Even if one were motivated by the teachings of Wyre to incorporate reinforcing ribs in order to strengthen a pipe fitting, there is still no suggestion as to the desirability of providing reinforcing ribs on an injection molded plastic tee for use at the inlet or outlet of a septic tank. The rejection should therefore be reversed.

**IV. REJECTION OF CLAIM 6 UNDER 35 USC § 103(a)  
AS UNPATENTABLE OVER RAMM, U.S. PAT. NO. 3,633,943, IN VIEW OF  
CARROW, U.S. PAT. NO. 4,690,632 AS APPLIED TO CLAIM 1, AND FURTHER  
IN VIEW OF MORRISON, U.S. PAT. NO. 901,545**

**A Prima Facie Case of Obviousness of Claim  
6 Has Not Been Established**

Claim 6 was rejected as being unpatentable over Ramm in view of Carrow as applied to claim 1, and further in view of Morrison. The final Office action concedes that Ramm, as modified by Carrow, fails to disclose the use of a “reducing bushing” or “reducer” in the inlet/outlet port. According to the final Office action:

It would have been obvious to one having ordinary skill in the art at the time the invention was made to incorporate the teaching of a device that helps to receive a first or second outer diameter into the inlet/outlet hub, as taught by Morrison, into a tee as described by Ramm, as modified by Carrow, in order to adapt a bigger and larger filter and to adapt different pipes with different outer diameters.

P. 6. As discussed on page 4 of the Applicant’s specification, most known commercial effluent filters require a generally cylindrical housing extending to cover much, if not all, of the extended length of the effluent filter, so that filtered effluent may reach the outlet port of the tee, and exit the tank portion of the system, but without again mixing with unfiltered sewage. This specific need, i.e. to cover the extended length of conventional effluent filters, was not adequately met by conventional pipe tees alone. Conventional pipe tees were formed as relatively short-length plumbing couplings. Thus, the problem is *not* that the filters have gotten bigger. Therefore, there is no need to “adapt a bigger and larger filter” as speciously argued in the final Office Action. This was a contrived motivation and therefore cannot be relied upon as the basis to combine the references to establish a prima facie case of obviousness.

The other proffered motivation in the final Office action to combine the teachings of Morrison with the tee described in Ramm as modified by Carrow, namely “to adapt different pipes with different outer diameters,” is also not supported by Morrison. As discussed in Section

I.A, *supra*, Morrison does not disclose a reducer bushing, and does not suggest a need for one. Rather, the portion identified as a<sup>6</sup> in Fig. 8 of Morrison is a different component for a different use, namely a ring which may be inserted in the hub to stop the end of a succeeding tee. The material above the ring a<sup>6</sup> is oakum and lead for caulking. Thus, it is improper to rely upon Morrison as teaching or suggesting a device that helps to receive a pipe having a first or second outer diameter into the inlet/outlet hub generally, or a reducer bushing specifically. Inasmuch as Morrison fails to teach that which it is relied upon to show, the rejection to claim 6 should be reversed.

**V. REJECTION OF CLAIM 16 UNDER 35 USC § 103(a)  
AS UNPATENTABLE OVER MORRISON, U.S. PAT. NO. 901,545 IN VIEW OF  
CARROW, U.S. PAT. NO. 4,690,632 AND WYRE, U.S. PAT. NO. 1,052,098 AND  
FURTHER IN VIEW OF PINION, U.S. PAT. NO. 4,798,028**

**A Prima Facie Case of Obviousness of Claim  
16 Has Not Been Established**

Claim 16 was rejected as being unpatentable under 35 U.S.C. § 103 over Morrison in view of Carrow and Wyre, and further in view of Pinion, U.S. Patent No. 4,798,028. Claim 16 recites the tee baffle of claim 15, in combination with an effluent filter received in the tubular opening thereof. According to the final Office action, "Morrison, as modified by Carrow and Wyre, fails to disclose an efficient [sic.] filter inside the main body." It is further stated that "Pinion teaches that it is well known in the art to have a filter (15) located inside a main body (12) of a pipefitting (10)." The flat screen (15) of Pinion is not an "effluent filter" as recited by the Applicant's claim 16. In the field of septic tank outlets, as discussed at page 3 of the Applicant's specification, it is necessary for an effluent filter to resist being blocked by grease, fats, oils, hair, lint, and other floatables in effluent. In addition to these floatables, an effluent filter must resist clogs due to biologic growth on such materials trapped by the effluent filter. Resistance to these elements requires a significant surface area and cannot be accomplished by a

single layer of a flat screen such as the flat screen (15) of Pinion, because such a flat screen would clog too quickly.

To appreciate the difference between a flat screen for use in a downspout, such as in Pinion, versus an effluent filter for a septic system as recited in claim 16, it is useful to consider the differences in what would happen if each were clogged. The consequences of a plugged effluent filter are far more severe than an obstructed downspout trap. While the obstructed downspout may result in rainwater being innocuously diverted elsewhere, an obstructed effluent filter can catastrophically lead to sewage backup within a home or business. As such, one of ordinary skill in the art would not consider the flat screen (15) of Pinion to be an "effluent filter" as required by claim 16. Furthermore, the use of a filter in a pipefitting is irrelevant, as the Applicant's invention is not a pipefitting, but rather, an injection molded plastic part for use at the inlet or outlet of a septic tank. The rejection of claim 16 should therefore be reversed.

**VI. REJECTION OF CLAIM 20 UNDER 35 USC § 103(a)  
AS UNPATENTABLE OVER MORRISON, U.S. PAT. NO. 901,545, IN VIEW OF  
CARROW, U.S. PAT. NO. 4,690,632, AND FURTHER IN VIEW OF PINION, U.S.  
PATENT NO. 4,798,028**

**A Prima Facie Case of Obviousness of Claim  
20 Has Not Been Established**

Claim 20 was rejected under 35 U.S.C. § 103 over Morrison, U.S. Patent No. 901,545, in view of Carrow, U.S. Patent No. 4,690,632, and further in view of Pinion, U.S. Patent No. 4,798,028. The arguments set forth in Section V, *supra*, with respect to claim 16 apply equally as to claim 20, inasmuch as both claims recite an effluent filter received in the tubular opening. In addition, conspicuously absent from the discussion in the final Office action explaining the basis for the rejection of claim 20 is any mention of the lowermost end of a tee for use at the inlet or outlet of a septic tank extending into a clear zone of the septic tank when the tee is mounted at the septic tank outlet. As explained at page 5 of the Applicant's specification, it is desirable for

the elongated portion of pipe tees used in septic tanks to extend lower, i.e. deeper into the clear zone<sup>1</sup> of the effluent in the septic tank, than is minimally necessary for the elongated portion of the tee to cover the effluent filter.

Claim 20 recites that the lowermost end extends into a clear zone of the septic tank when the tee is mounted at the septic tank outlet. Inasmuch as none of the references relied upon in the final Office action show tees mounted at septic tank outlets, nor do any show an effluent filter as that term is understood by those of ordinary skill in the art, a prima facie case of obviousness of claim 20 has not been established. The rejection of claim 20 should be reversed.

**VII. THE EXAMINER FAILED TO GIVE ADEQUATE CONSIDERATION AND WEIGHT TO THE AFFIDAVITS UNDER 37 CFR § 1.132 FILED DECEMBER 2, 2002, AUGUST 7, 2003, AND MARCH 25, 2005**

Compounding the erroneous obviousness rejections is the failure to give due consideration to the Applicant's affidavits under 37 CFR § 1.132 submitted December 2, 2002, August 7, 2003, and March 25, 2005, and the evidence of secondary considerations of non-obviousness contained therein. It is well settled that where evidence of secondary considerations is present, it must always be considered, and given due weight, in connection with an obviousness determination. *See, e.g.,* M.P.E.P. § 716.01(a); *In re De Blauwe et al.*, 736 F.2d 699, 706, 222 USPQ 191, 196-97 (Fed. Cir. 1984) ("evidence arising out of secondary

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<sup>1</sup> The clear zone is the region in a septic tank between the upper scum and lower sludge layers.

considerations must always be considered.”)<sup>2</sup>

A. Evidence of Commercial Success

Like in *In re Alton*, 76 F.3d 1168, 1175-76, 37 USPQ2d 1578, 1583-84 (Fed. Cir. 1996), where the Federal Circuit found error for dismissing a declaration without an adequate explanation of how the declaration failed to overcome a prima facie case, the three affidavits of Theodore Meyers have basically been ignored, with only scarce discussion of how the declarations purportedly do not overcome a prima facie case of obviousness. Rather than considering and addressing the affidavits on their merits, the final Office action criticizes the affidavits for explaining how the sales of his product increase, but failing to explain why the sales increase, and failing to demonstrate his invention with respect to other devices that are in the market.

A comparison of sales of the Applicant’s invention to the sales of conventional plumbing tees used prior to the Applicant’s invention for the inlet or outlet of a septic tank would be a meaningless exercise. As discussed at page 2 of the Applicant’s specification:

Typically, installers of septic tanks and other on-site waste disposal systems use standard tees or sweep tees manufactured primarily for use in plumbing applications, such as for pipe joints or couplings. As a result, such standard tees

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<sup>2</sup> See also *In re Sernaker*, 702 F.2d 989, 996, 217 USPQ 1, 7 (Fed. Cir. 1983) (“If, however, a patent applicant properly presents evidence relating to these secondary considerations, the board must always consider such evidence in connection with the determination of obviousness.” (citing *In re Fielder and Underwood*, 471 F.2d 640, 644, 176 USPQ 300, 303 (CCPA 1973))); *Simmons Fastener Corporation v. Illinois Tool Works, Inc.*, 739 F.2d 1573, 1575, 222 USPQ 744, 746 (Fed. Cir. 1984) (“evidence bearing on issue of nonobviousness ‘is never of ‘no moment,’ is always to be considered and accorded whatever weight it may have.’” (citing *In re Mageli et al.*, 470 F.2d 1380, 1384, 176 USPQ 305, 307 (CCPA 1973))); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d at 1555, 220 USPQ at 314 (Fed. Cir. 1983) (“The objective evidence of nonobviousness . . . should when present always be considered as an integral part of the analysis.”); *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538, 218 USPQ 871, 879 (Fed. Cir. 1983) (“evidence rising out of the so-called ‘secondary considerations’ must always when present be considered en route to a determination of obviousness.”).



and sweep tees are not universally adequate for serving as the housing for an effluent filter inside the septic tank. They are relatively heavy, and relatively expensive for use in septic systems.

The impact of sales of inventor Meyers' product on the market for the total annual production of standard tees and sweep tees would naturally be insignificant, and perhaps easily dismissed on a comparative basis. Those standard tee and sweep tee products are primarily intended for use in indoor plumbing applications, which is a much larger market than septic tanks. In other words, the present invention, although displacing merely a drop in the ocean of sales of standard tees and sweep tees used in plumbing applications, has created a *new* product, namely effluent filter housings specifically for use at the inlet or outlet of septic tanks. There has been continuous exponential growth of sales of the T-BAFFLE tees, as evidenced by Mr. Meyers' affidavits. Such evidence is particularly compelling when coupled with the sworn statement of Mr. Meyers, who has "some 20 years of inventive, research, development, sales, manufacturing and marketing experience in the on-site waste disposal system component business." Meyers' December 2, 2002 Affidavit, ¶ 8. He interprets the sales data as reflecting "a substantial commercial success for the T-BAFFLE tees," which he attributes to the claimed features of the subject patent application. *Id.* All such evidence should have been considered as sufficient evidence of commercial success to overcome a prima facie case of obviousness. *Akzo N.V. v. International Trade Comm'n*, 808 F.2d 1471, 1481, 1 USPQ2d 1241, 1246 (Fed. Cir. 1986)(recognizing commercial success as a strong factor favoring non-obviousness).

B. Evidence of Copying by Others

Mr. Meyers' affidavits and the appendices thereto also evidence copying by others, which is another well-recognized secondary consideration of non-obviousness. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 US 428, 442 (1911); *Windsurfing Int'l Inc. v. AMF, Inc.*, 782 F.2d 995, 1000, 228 USPQ 562, 565 (Fed. Cir. 1986). Specifically, Mr. Meyers' affidavits

present evidence of products introduced *after* the introduction of Tuf-Tite T-BAFFLE tees by Tuf-Tite's two biggest competitors, Zabel Environmental Technology, a/k/a Zabel, Inc. ("Zabel") and Polylok, Inc. ("Polylok")<sup>3</sup>. See Meyers' December 2, 2002 Affidavit, ¶¶ 10-16 and Appendices 2-5, August 7, 2003 Affidavit, ¶ 14 and Appendix C, and March 25, 2005 Affidavit, ¶¶ 26-39 and Appendices 6 and 7. Both the Zabel Versa-Tee and the Polylok "PL-68 Tee" products have inlet/outlet hubs which are adapted to accept pipes of two different diameters. As discussed in Sections I.A and II, *supra*, neither of the primary references used in the rejections of the Applicant's independent claims, i.e. neither Morrison nor Ramm, disclosed inlet/outlet hub having a diameter sized to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a *second* outer diameter. This claimed feature, in combination with the other features recited in the Applicant's claims, results in a novel and non-obvious combination.

Neither the final Office action nor any of the previous Office actions make any reference to the evidence of copying by others presented in Mr. Meyers' affidavits. As in *In re Alton*, 76 F.3d at 1175-76, 37 USPQ2d at 1583-84, the portions of Theodore Meyers' affidavits presenting evidence of copying by others have basically been ignored, without any adequate discussion of how the declarations or evidence fail to overcome a prima facie case of obviousness. By not addressing this legitimate evidence of non-obviousness, the final Office action improperly raised the burden on the Applicant to an insurmountable level.

As the Board explained in *Ex parte Ohsaka*, 2 USPQ2d 1461 (Bd.Pat.App.&Int. 1987), reverting to an initial conclusion of obviousness, with a conclusory statement that a 1.132 declaration is unconvincing "for the reasons given in support of the [initial] conclusion [of

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<sup>3</sup> On information and belief, in March, 2006, Polylok purchased Zabel.

obviousness]" is incorrect: "The flaw with this approach is that the examiner has, in practical effect, converted a rebuttable presumption into a conclusive or irrebuttable presumption of obviousness." 2 USPQ2d at 1462. Copies of Mr. Meyers' affidavits are submitted herewith, in the Evidence Appendix.<sup>4</sup>

The rejections of claims 1, 4, 6, and 19, and of claims 2, 3, 5, 15-18, and 20-23, should be withdrawn for failure to adequately consider Mr. Meyers' affidavits. Had the affidavits properly been considered, they would have been found to overcome the minimum threshold prima facie showing of obviousness established in the Office Actions, if indeed such a prima facie showing has been established. As claims 1, 4, 6, and 19, and 2, 3, 5, 15-18, and 20-23 would not have been obvious to one of ordinary skill in the art at the time of the invention, those claims are respectfully submitted to be allowable.

### CONCLUSION

Due to reliance on non-analogous art, proposed combinations which do not result in the Applicant's claims, and proposed modifications of references with contrived motivations to combine, the rejections in the final Office action do not establish a prima facie case of obviousness. To the extent a prima facie case of obviousness has been established as to any of Applicant's pending claims, the Applicant has met his burden to rebut that case with convincing

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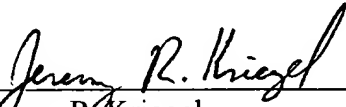
<sup>4</sup> It is respectfully submitted that in the event the Examiner's Answer includes any new arguments concerning, for example, the adequacy of the objective evidence submitted in any of Mr. Meyers' three affidavits, such late arguments would constitute good and sufficient cause permitting the submission, after final and after appeal, of additional evidence of secondary considerations as may be necessary to rebut those arguments. *See, e.g., In re De Blauwe et al.*, 736 F.2d 699, 706 n.9, 222 USPQ 191, 197 n.9 (Fed. Cir. 1984) (vacating affirmed obviousness rejection and remanding, reasoning that where Board or examiner challenges for the first time on appeal the sufficiency of assertions of unexpected results, submitted by an applicant to rebut an obviousness rejection, it is improper not to afford the applicant the opportunity to submit objective evidence of unexpected results). It is noted that ample time existed prior to the final Office Action for the Examiner to have made any arguments concerning the adequacy of the objective evidence submitted in Mr. Meyers' affidavits.

evidence of secondary considerations of non-obviousness, including commercial success and copying by others. The failure to give due consideration to the Applicant's three affidavits regarding secondary considerations of non-obviousness was reversible error. It is respectfully submitted that claims 1-6 and 15-23 are allowable and all rejections in the final Office action should be reversed.

The instant (Substitute) Appeal Brief is being submitted in response to a Notification of Non-Compliance with the Requirements of 37 CFR 41.37(c), mailed May 16, 2006. An authorization for a charge to the deposit account for any fees due in connection with the filing of an Appeal Brief in the present application was made in the Appeal Brief filed on April 10, 2006. In the event any additional fees are necessary, or excess fees have been paid, kindly charge (or credit) the appropriate amount to our Deposit Account No. 13-2855.

Dated: June 16, 2006

Respectfully submitted,

  
Jeremy R. Kriegel  
Reg. No. 39,257

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## **(J) CLAIMS APPENDIX**

Claim 1: A tee for use at the inlet or outlet of a septic tank, the tee comprising:

an elongated generally cylindrical injection molded plastic main body portion defining a tubular opening, the tubular opening being adapted to receive a filter therein;

a cylindrical injection molded plastic uppermost hub coaxial with said elongated main body portion and having an inner diameter greater than the diameter of the elongated main body portion; and

an inlet/outlet port in communication with the tubular opening, the inlet/outlet port having an inlet/outlet hub at an open end thereof, said inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outer diameter, said diameter of the inlet/outlet hub being greater than the diameter of the elongated main body portion.

Claim 2: The tee of claim 21, wherein said first and second injection molded plastic ribs extend outwardly from an outer wall of the elongated injection molded plastic main body portion and said uppermost hub.

Claim 3: The tee of claim 2, further including seams coextending with said first and second ribs.

Claim 4: The tee of claim 1, wherein said inlet/outlet port includes a sweep portion arcing upwardly from said elongated main body portion toward a ring defined by said inlet/outlet hub, said sweep portion defining an opening in communication with said tubular opening and said inlet/outlet hub.

Claim 5: The tee of claim 1, further comprising at least two horizontal reinforcement ribs on an outer wall of the elongated main body portion.

Claim 6: The tee of claim 1, in combination with a reducer bushing securely received in said inlet/outlet port.

Claim 15: A one-piece sanitary tee baffle comprising:

an elongated generally cylindrical injection molded plastic main body portion defining a tubular opening, the tubular opening being adapted to receive a filter therein;

a cylindrical uppermost hub coaxial with said elongated injection molded plastic main body portion and having an inner diameter greater than said diameter of the elongated injection molded plastic main body portion; an inlet/outlet port in communication with the tubular opening, the inlet/outlet port having an inlet/outlet hub at an open end thereof, said inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outer diameter, said diameter of the inlet/outlet hub being greater than the diameter of the elongated main body portion;

a first rib extending generally longitudinally along said elongated main body portion;

a second rib extending generally longitudinally along said elongated injection molded plastic main body portion, said generally cylindrical injection molded plastic main body portion having a wall thickness between 0.075" and 0.100" over a substantial portion thereof.

Claim 16: The one-piece sanitary tee baffle of claim 15, in combination with an effluent filter received in the tubular opening thereof.

Claim 17: The one-piece sanitary tee baffle of claim 15, in combination with a length of pipe received in said inlet/outlet hub.

Claim 18: The combination of claim 17, further comprising a reducer bushing between said inlet/outlet hub and said length of pipe received therein.

Claim 19: The tee of claim 4, having a lowermost end and a length extending from a top of the uppermost hub to said lowermost end, said outlet opening of the inlet/outlet port being located along said length nearer to said uppermost hub than to said lowermost end.

Claim 20: The tee of claim 19, wherein said main body portion houses an effluent filter received in said tubular opening, and said lowermost end extends into a clear zone of the septic tank when the tee is mounted at the septic tank outlet.

Claim 21: The tee of claim 1, further comprising a first injection molded plastic rib extending generally longitudinally along said elongated injection molded plastic main body portion; and a second injection molded plastic rib extending generally longitudinally along said elongated injection molded plastic main body portion.

Claim 22: The one-piece sanitary tee baffle of claim 15, wherein the wall thickness of the elongated generally cylindrical main body portion is about 0.090".

Claim 23: A tee for use at the inlet or outlet of a septic tank, the tee comprising:  
an elongated generally cylindrical injection molded plastic main body portion defining a tubular opening, the tubular opening being adapted to receive a filter therein;  
a cylindrical injection molded plastic uppermost hub coaxial with said elongated injection molded plastic main body portion and having an inner diameter greater than a diameter of the elongated injection molded plastic main body portion;  
an inlet/outlet port in communication with the tubular opening, the inlet/outlet port having an

inlet/outlet hub at an open end thereof, said inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outer diameter, said diameter of the inlet/outlet hub being greater than the diameter of the elongated injection molded plastic main body portion;

an outer wall on said elongated injection molded plastic main body portion; and

at least one horizontal reinforcing rib on said outer wall.



**(K) EVIDENCE APPENDIX**

K-I - Affidavit of Theodore Meyers Under 37 CFR § 1.132, filed December 2, 2002

K-II - Supplemental Affidavit of Theodore Meyers Under 37 CFR § 1.132,  
filed August 7, 2003

K-III - Third Affidavit of Theodore Meyers Under 37 CFR § 1.132, filed March 25, 2005

**PATENT**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

APPLICANT: Meyers )  
 )  
APPLICATION NO.: 09/652,927 ) Examiner: Lugo  
 )  
FILED: October 31, 2000 ) Art Unit: 3677  
 )  
FOR: TEE BAFFLE FOR USE AT INLET )  
OR OUTLET OF SEPTIC AND )  
OTHER ON-SITE WASTE )  
DISPOSAL SYSTEMS )

**AFFIDAVIT OF THEODORE W. MEYERS UNDER 37 C.F.R. §1.132**

I, Theodore W. Meyers, hereby swear as follows:

1. I am the founder and President of Tuf-Tite, Inc. ("Tuf-Tite"), the Assignee of United States Patent Application No. 09/652,927, entitled TEE BAFFLE FOR USE AT INLET OR OUTLET OF SEPTIC AND OTHER ON-SITE WASTE DISPOSAL SYSTEMS, and I am also the sole inventor thereof.

2. I have reviewed the Office Actions mailed on November 27, 2001 and July 2, 2002, and the prior art references on which the rejections under 35 U.S.C. § 103(a) are based.

3. The purpose of this Affidavit is to submit evidence of secondary considerations of non-obviousness, including commercial success and copying by others, in order to rebut the obviousness rejections in the Office Action mailed July 2, 2002.

4. I am familiar with the art of design and manufacture of septic tanks and other on-site waste disposal systems, as well as design and manufacture of the various components used in conjunction with such waste disposal systems, including injection-molded plastic components. I am the inventor of thirteen issued United States patents on products in this field.

5. In particular, I am familiar with older and newer versions of commercially-available injection-molded plastic tees utilized at the inlet and/or outlet of septic and other on-site waste

disposal systems to direct the flow of unfiltered and filtered effluent, and with the filter elements sometimes used in conjunction with such tees. I am also familiar with the labor and time involved in the actual field installation of these types of tees.

6. Tuf-Tite is a manufacturer and supplier of various products in the septic tank and other on-site waste disposal equipment field. Tuf-Tite has introduced numerous new products in the septic tank/on-site waste disposal area over the years. Thus, I am familiar with the history, sales growth, and performance of new products in this field. With particular relevance here, soon after introducing the tees made in accordance with the claims of the subject patent application to customers, I immediately recognized a dramatic volume of sales of such tees, and much more than would be expected based on my long experience in this field.

7. Tuf-Tite sells tees made in accordance with the claims of the subject patent application, sold under the trade name "T-BAFFLE," and under Tuf-Tite's product number "TB-4." Attached as Appendix 1 to this Affidavit is a three page sales report entitled "Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK INLET AND OUTLET," which is a true and accurate thirty-six month record of the sales volume for the T-BAFFLE tees sold by Tuf-Tite covering the time period from October, 1999, a date before such sales commenced, through September, 2002 (with the introduction of the T-BAFFLE tees being in May, 2000). During this time period, Tuf-Tite sold a total of 122,527 T-BAFFLE tees, for a total dollar sales of \$359,746.00.

8. Based on my some 20 years of inventive, research, development, sales, manufacturing and marketing experience in the on-site waste disposal system component business, the sales figures shown in Appendix A reflect a substantial commercial success for the T-BAFFLE tees. Further, I consider all the commercial success of Tuf-Tite's T-BAFFLE tees to be attributable to

the claimed features of the subject patent application, as I know of no other reasons that would have caused such a high volume of sales.

9. Further, this commercial success was realized notwithstanding the fact that use of the T-BAFFLE tees is subject to regulatory approval in many states, and with approvals still pending in certain states. I therefore expect the sales of Tuf-Tite's T-BAFFLE tees to continue to improve as Tuf-Tite obtains regulatory approval for use (i.e., permission to use the tees, as opposed to mandatory use) of the tees in certain states where approval is required, such as in Arkansas and Indiana.

10. Among the significant sales described above, between June 19, 2000 and December 20, 2000, a Tuf-Tite competitor, Zabel Environmental Technology, a/k/a Zabel, Inc., ("Zabel"), purchased 14,040 of the "T-BAFFLE" tees from Tuf-Tite, for a total of \$44,928.00. (See Appendix 2, which is a true and accurate report of all T-BAFFLE tees that Tuf-Tite provided to Zabel) Prior to June 19, 2000, it is my understanding that Zabel manufactured no such tee product, and particularly, Zabel did not manufacture any that was a universal tee product (like the Tuf-Tite TB-4 product), which could accept, and thereby be used with, multiple different standard sizes of pipe product, including Schedule 40 pipe and SDR 35 pipe. Notwithstanding the fact that Zabel is a Tuf-Tite competitor, it is my understanding that Zabel bought the Tuf-Tite TB-4 tees for its own resale since there was no other such product on the market, and had not previously been any, and Zabel wished to remain competitive with Tuf-Tite's substantial sales in that product area.

11. On both May 17, 2000 and May 18, 2001, Tuf-Tite sent Zabel a free sample of the T-BAFFLE tee. Tuf-Tite sent Zabel the May 18, 2001 sample in an unsuccessful effort to re-gain Zabel's business with respect to the T-BAFFLE tee, as by then Zabel had stopped buying the

Tuf-Tite TB-4 tees. In fact, as shown in Appendix 2, since December 20, 2000, Zabel has not purchased a single T-BAFFLE tee from Tuf-Tite, despite continuing to purchase numerous other Tuf-Tite products related to septic tanks and other on-site waste systems. (See Appendix 3, which is a collection of true and accurate sales histories reflecting purchases by Zabel of various other Tuf-Tite products prior to and since December 20, 2000)

12. Sometime in the summer of 2001, not long after Zabel stopped purchasing T-BAFFLE tees from Tuf-Tite, Zabel began advertising and selling its own universal tee for septic and other on-site waste disposal systems, under the trade name "Versa-Tee™". (See Appendix 4, which is a true and accurate copy of an excerpt from Zabel's Summer 2001 industry publication "The Zabel Zone®," including an article entitled "Filter Tee." See also Appendix 5, which is a true and accurate copy of an advertising insert showing the Zabel "Versa-Tee™" product.)

13. As the Zabel trade name and marketing materials suggest, the "Versa-Tee™" product is offered as a versatile product that is adapted to accept both Schedule 40 as well as SDR-35 pipe in its inlet/outlet port.

14. Specifically, the marketing material shown in Appendix 4 states: "Our new tee baffle also accepts both thin-wall pipe and Schedule 40 four-inch pipe." The material shown in Appendix 5 states:

Versa-Tee™

Versatile Design

- outlet accept SDR 35 or SCH 40

15. I have also personally inspected the "Versa-Tee™" product and from my inspection I can confirm that not only is the product adapted to accept both Schedule 40 and SDR 35 pipe,

but also, the product is made of a thin-walled, generally cylindrical main body portion, i.e. substantially thinner than, on the order of about half the thickness of, Schedule 40 pipe, which is the thickness typically employed in the body portion of conventional tees having hubs sized to receive Schedule 40-sized pipe.

16. According to independent claims 1, 15, and 23 of the subject patent application assigned to Tuf-Tite, the claimed tee is provided with an inlet/outlet port in communication with the tubular opening of the tee, the inlet/outlet port having an inlet/outlet hub at an open end thereof, the inlet/outlet hub having a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outside diameter, and the diameter of the inlet/outlet hub being greater than the diameter of the elongated main body portion. Claim 15 further claims a wall thickness between 0.075" and 0.100" over a substantial portion of the elongated main body portion of the tee baffle, which is substantially thinner than Schedule 40-sized pipe thickness, the thickness typically employed in the body portion of conventional tees having hubs sized to receive Schedule 40-sized pipe. These claimed features are understood to be why Zabel bought 14,040 of Tuf-Tite's TB-4 tees, and then later came out with the Zabel "Versa-Tee™," as no other such tee was available in the marketplace (or ever even known to me).

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17. As can be readily seen from the advertisement of the Zabel "Versa-Tee™" product, Zabel's tee is similarly provided with an inlet/outlet port in communication with the tubular opening of the tee, the inlet/outlet port has an inlet/outlet hub at an open end thereof, the inlet/outlet port has a diameter that is sized to receive a pipe of a first outer diameter (i.e., Schedule 40 pipe), the inlet/outlet hub is adapted to also receive a pipe of a second outside diameter (i.e., SDR 35 pipe), and the diameter of the inlet/outlet hub is greater than the diameter

of the main body portion of the tee (as demonstrated by the fact that the portion of the inlet/outlet hub sized to receive SDR 35 pipe, i.e. the smallest diameter of that hub, is the same diameter of the uppermost hub of the tee, which is larger than the diameter of the main body portion of the tee). Furthermore, as I saw in my personal inspection of the Versa-Tee™ product, the generally cylindrical main body portion of the tee has a thin-walled construction, on the order of about half the thickness of Schedule 40-sized pipe. In my experience, one of ordinary skill in this art would not expect to find such a thin wall thickness in a tee, as conventional tees, unlike the tees claimed in the subject patent application for use at the inlet or outlet of septic and other on-site waste systems, are typically used in plumbing situations in which the tees must withstand high pressures, and hence, are formed of much thicker walls than the "T-BAFFLE" product.

18. As the attached sales histories demonstrate, Zabel has not purchased any of the "T-BAFFLE" tees from Tuf-Tite since December 20, 2000, seven months following Tuf-Tite's introduction into the market of the "T-BAFFLE" product.

19. The foregoing is real-world evidence of copying by Zabel. That copying, coupled with the large commercial success realized by Tuf-Tite on its "T-BAFFLE" tees, demonstrates the non-obviousness of the claimed subject matter of the present patent application.

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20. The Tuf-Tite T-BAFFLE tees have been certified by the NSF Certification to Standard 46, governing effluent filters and housings.

21. I hereby affirm that all of the foregoing statements are true and accurate to the best of my knowledge and belief, that each of the documents appended hereto are true and accurate

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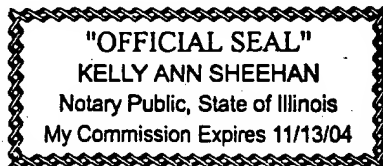
copies of what they purport to represent, and that I am aware any false statements may subject me to penalties for perjury and may jeopardize the validity of any patent(s) that may issue on the present application.

November 26 2002

Theodore W. Meyers  
Theodore W. Meyers  
Inventor & President,  
Tuf-Tite, Inc.

Subscribed and sworn to before me on this 26<sup>th</sup>  
day of November, 2002

Kelly A. Sheehan  
(Notary Public)





Sales History for TB-4, T-Baffle for Septic Tank Inlet and Outlet

Pds Past	End Date	\$ Sales	% Prior	Qty Sls	% Prior	Period ASP
36	10/31/99	0	N/A	0	N/A	0.00
35	11/30/99	0	100	0	100	0.00
34	12/31/99	0	100	0	100	0.00
33	01/31/00	0	100	0	100	0.00
32	02/29/00	0	100	0	100	0.00
31	03/31/00	0	100	0	100	0.00
30	04/30/00	0	100	0	100	0.00
29	05/31/00	4,340	100	1,185	100	3.66
28	06/30/00	20,676	476	7,583	639	2.73
27	07/31/00	8,696	42	4,923	64	1.77
26	08/31/00	9,119	104	3,096	62	2.95
25	09/30/00	18,865	206	5,639	182	3.35
Totals (36-25)		61,696		22,426		2.75
Avg. of Pds (36-25)		5,141.33		1,868.83		

# Sales History for 1B-4, T-Baffle for SEP IIC TANK INLET AND OUTLET

Pds Past	End Date	\$ Sales	% Prior	Qty Sls	% Prior	Period ASP
24	10/31/00	4,041	21	2,602	21	1.55
23	11/30/00	19,951	493	5,981	229	3.34
22	12/29/00	21,561	108	6,907	115	3.12
21	01/31/01	10,763	49	4,145	60	2.60
20	02/28/01	3,199	29	1,477	35	2.17
19	03/30/01	8,027	250	2,601	176	3.09
18	04/30/01	8,841	110	3,025	116	2.92
17	05/31/01	15,113	170	5,695	188	2.65
16	06/29/01	12,506	82	3,634	63	3.44
15	07/31/01	11,742	93	3,895	107	3.01
14	08/31/01	9,008	76	3,729	95	2.42
13	09/28/01	11,406	126	3,373	90	3.38
Totals (24-13)		136,158		47,064		2.89
Avg. of Pds (24-13)		11,346.50		3,922.00		

Sales History for TB-4, T-Baffle for Septic Tank Inlet and Outlet

Pds Past	End Date	\$ Sales	% Prior	Qty Sls	% Prior	Period ASP
12	10/31/01	12,460	109	3,198	109	3.90
11	11/30/01	10,321	82	3,225	100	3.20
10	12/31/01	10,920	105	3,216	99	3.40
9	01/31/02	13,428	122	4,277	132	3.14
8	02/28/02	9,270	69	3,330	77	2.78
7	03/29/02	9,970	107	2,975	89	3.35
6	04/30/02	14,465	145	4,820	162	3.00
5	05/31/02	16,747	115	5,926	122	2.83
4	06/28/02	14,104	84	4,522	76	3.12
3	07/31/02	19,657	139	6,556	144	3.00
2	08/30/02	16,132	82	5,885	89	2.74
1	09/30/02	14,418	89	5,107	86	2.82
Totals (12-1)		161,892		53,037		3.05
Avg. of Pds (12-1)		13,491.00		4,419.75		

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Tuf-Tite Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = TB-4

ust #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
=====					
* Item # / Item ==> TB-4 / T-Baffle FOR SEPTIC TANK INLET AND					
IN1	66180	05/17/00	AD	EA	1.000
IN1	67390	06/19/00	AD	EA	2880.000
IN1	70508	09/19/00	AD	EA	2520.000
IN1	72240	11/03/00	AD	EA	2880.000
IN1	73287	12/20/00	AD	EA	5760.000
IN1	77015	05/18/01	AD	EA	1.000
					-----
* Subtotal **					14042.000
					=====
** Total ***					14042.000

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Tuf-Tite Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = SL-4

st #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
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Item # / Item	SL-4 / 4"	SPEED LEVELER			
N1 62157	12/16/99	AD EA			100.000
N1 67897	07/05/00	AD EA			500.000
N1 73463	01/05/01	AD EA			200.000
N1 73805	01/24/01	AD EA			500.000
N1 76024	04/23/01	AD EA			350.000
N1 76527	05/07/01	AD EA			250.000
N1 76880	05/15/01	AD EA			250.000
N1 77758	06/11/01	AD EA			500.000
N1 79825	08/03/01	AD EA			500.000
N1 80435	08/20/01	AD EA			500.000
N1 82670	10/23/01	AD EA			200.000
N1 83577	11/15/01	AD EA			500.000
N1 85681	02/14/02	AD EA			1000.000
N1 87929	04/26/02	AD EA			1000.000
N1 90619	07/03/02	AD EA			1000.000

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* Subtotal **	7350.000
** Total ***	7350.000

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Tuf-Tite Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = 6HD2

ust #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
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* Item # / Item ==> 6HD2 / 6 HOLE DISTRIBUTION BOX					
IN1	62157	12/16/99	AD	EA	12.000
IN1	64678	04/05/00	AD	EA	48.000
IN1	73578	01/12/01	AD	EA	48.000
IN1	75329	04/03/01	AD	EA	48.000
IN1	77563	06/05/01	AD	EA	24.000
IN1	78329	06/26/01	AD	EA	24.000
IN1	79367	07/23/01	AD	EA	36.000
IN1	79825	08/03/01	AD	EA	48.000
IN1	82670	10/23/01	AD	EA	24.000
IN1	82842	10/26/01	AD	EA	24.000
IN1	83602	11/15/01	AD	EA	48.000
IN1	83752	11/20/01	AD	EA	84.000
IN1	85681	02/14/02	AD	EA	48.000
IN1	85741	02/15/02	AD	EA	48.000
IN1	88902	05/21/02	AD	EA	48.000
IN1	89155	05/28/02	AD	EA	1.000
IN1	90619	07/03/02	AD	EA	100.000

* Subtotal **	713.000
** Total ***	713.000

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Page: 1

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Tuf-Tite Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = 4HD2

Inst #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
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* Item # / Item ==> 4HD2 / 4 HOLE DISTRIBUTION BOX					
ZIN1	62157	12/16/99	AD	EA	12.000
ZIN1	64678	04/05/00	AD	EA	48.000
ZIN1	73029	12/05/00	AD	EA	48.000
ZIN1	73173	12/12/00	AD	EA	48.000
ZIN1	74357	02/26/01	AD	EA	48.000
ZIN1	75329	04/03/01	AD	EA	48.000
ZIN1	77563	06/05/01	AD	EA	24.000
ZIN1	77758	06/11/01	AD	EA	60.000
ZIN1	79367	07/23/01	AD	EA	48.000
ZIN1	79825	08/03/01	AD	EA	12.000
ZIN1	80888	08/31/01	AD	EA	100.000
ZIN1	82981	10/31/01	AD	EA	9.000
ZIN1	83752	11/20/01	AD	EA	48.000
ZIN1	85681	02/14/02	AD	EA	108.000
ZIN1	85741	02/15/02	AD	EA	108.000
ZIN1	90808	07/10/02	AD	EA	100.000

\*\* Subtotal \*\*

869.000

\*\*\* Total \*\*\*

869.000

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Tuf-Tite Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = DB6

ust #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
=====	=====	=====	=====	=====	=====
* Item # / Item ==> DB6 / 6" DROP BOX					
IN1	62157	12/16/99	AD	EA	12.000
IN1	64678	04/05/00	AD	EA	120.000
IN1	73173	12/12/00	AD	EA	120.000
IN1	75046	03/23/01	AD	EA	48.000
IN1	77563	06/05/01	AD	EA	48.000
IN1	77758	06/11/01	AD	EA	48.000
IN1	79825	08/03/01	AD	EA	48.000
* Subtotal **					444.000
** Total ***					444.000

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Tuf-Tile Inc.  
Item Sales Analysis Report  
Current and History Files  
Cust = ZIN1 Item = 7HD2

ist #	Invoice #	Inv Date	Slpr	U/M	Qty Ship - Trn
-------	-----------	----------	------	-----	----------------

* Item # / Item ==> 7HD2 / 7 HOLE DISTRIBUTION BOX					
IN1	62157	12/16/99	AD	EA	5.000
IN1	64678	04/05/00	AD	EA	100.000
IN1	83577	11/15/01	AD	EA	15.000
IN1	88197	05/02/02	AD	EA	15.000
IN1	89155	05/28/02	AD	EA	15.000
IN1	91372	07/23/02	AD	EA	100.000

* Subtotal **					250.000
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** Total ***					250.000
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REDACTED

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Meyers )  
 )  
APPLICATION NO.: 09/652,927 ) Examiner: Lugo  
 )  
FILED: October 31, 2000 ) Art Unit: 3677  
 )  
FOR: TEE BAFFLE FOR USE AT INLET )  
OR OUTLET OF SEPTIC AND )  
OTHER ON-SITE WASTE )  
DISPOSAL SYSTEMS )

**SUPPLEMENTAL AFFIDAVIT OF THEODORE W. MEYERS UNDER 37 C.F.R. §1.132**

I, Theodore W. Meyers, hereby swear as follows:

1. I am the founder and President of Tuf-Tite, Inc. ("Tuf-Tite"), the Assignee of United States Patent Application No. 09/652,927, entitled TEE BAFFLE FOR USE AT INLET OR OUTLET OF SEPTIC AND OTHER ON-SITE WASTE DISPOSAL SYSTEMS, and I am also the sole inventor thereof.

2. I have reviewed the Office Action mailed on February 7, 2003, and the prior art references on which the rejections under 35 U.S.C. § 103(a) are based.

3. One purpose of this Supplemental Affidavit is to explain the reasons why I believe the prior art patents cited in the rejections set forth in the Office Action are different from my invention as claimed, or that there is no suggestion or motivation to combine the references in the proposed manner, so that it may be further appreciated why those references fail to render the invention as claimed in the pending application obvious. Another purpose of this Supplemental Affidavit is to submit additional consistent evidence of secondary considerations of non-obviousness, including commercial success copying by others, which, in conjunction with the evidence of non-obviousness submitted with my November 26, 2002 Affidavit, rebuts the obviousness rejections in the Office Action mailed February 7, 2003.

4. I, as a person skilled in the art to which my patent application pertains, would not have been motivated to combine the elongated body of the tee in Nurse, U.S. Patent No. 5,580,453, with the tee of Zoeller, U.S. Patent No. 6,136,190, the latter as modified to have an inlet/outlet hub that has a diameter sized so as to receive a pipe of a first outer diameter and being adaptable to receive a pipe of a second outside diameter. After careful review, I find no teaching or suggestion in either Nurse or Zoeller to combine them in the manner proposed. Zoeller shows the use of an expansion piece (30) in order to extend the length of the tee. This is just as described in the background section of my patent application, where it is explained that it is typical for an installer to cut off a relatively short portion of a 10' length of commercially available PVC pipe, for example 12", and use that separate length of pipe as the needed expansion piece, with the remainder of that PVC pipe length now being less usable, and often discarded as waste. The desire to avoid such unnecessary waste is one of the factors that motivated me to conceive of the invention as-claimed in my application. Thus, Zoeller's showing of a separate expansion piece teaches people ordinarily skilled in the art in a direction away from the use of an elongated main body portion.

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5. Had it been obvious to provide an elongated main body portion in a tee having a cylindrical uppermost hub having an inner diameter greater than a diameter of the tee's main body portion, and an inlet/outlet port with an inlet hub, then Zoeller, which was filed two and a half years after the Nurse patent issued, would have been expected to teach and use an integral elongated main body portion, instead of continuing to teach the wasteful and cumbersome use of a separate expansion piece to cover a filter received within the tee. But the Zoeller patent does not.

6. With respect, I disagree with the statement in the Office Action that "Morrison teaches that it is known in the art to have a tee adapted to receive a pipe of a first or second outer diameter (by using a reducer as illustrated in Figure 8)." Morrison does not teach the use of a reducer. Rather, in Figure 8, Morrison shows a ring (a<sup>6</sup>) inserted in the hub to operate as a stop for the end of a succeeding tee, i.e. to avoid the presence of a slip joint, sealed by oakum and lead, within a pipe tee. There is no teaching in Morrison of a pipe received inwardly of the ring (a<sup>6</sup>). The vertical lines in the drawing of Figure 8 represent the interior of the ring, not part of a pipe. Since the ring is used as a stop, it would be directly contrary to the purpose of the ring (a<sup>6</sup>) in Morrison to have a pipe received inwardly of the ring (a<sup>6</sup>). A pipe received within the ring (a<sup>6</sup>) would have to be sealed within the ring with some type of caulk, such as the oakum and lead described in the specification of Morrison, thus introducing a slip joint, including caulk, into soil pipe. Yet, this is exactly what Morrison expressly indicates is sought to be avoided by providing the ring (a<sup>6</sup>) in the first place.

7. As to claim 21 of my patent application, and those claims depending therefrom, Ramm does not disclose the use of ribs extending along an elongated main body portion as recited in the claims. For the reasons explained in ¶¶ 4, 5 above, it would not have been obvious to modify the tee of Zoeller to include the elongated body of Nurse. The bases (12) with mating surfaces (14) in Ramm, are areas of weakness of the two-piece pipe fitting shown in Ramm, as opposed to strengthening ribs. Therefore, no motivated combination of Ramm with Zoeller, Nurse, and Morrison would result in the invention as recited in claim 21.

8. As to claim 5 of my patent application, there is no teaching in Ramm, or any of the other references listed in the Office Action, of the use of at least one horizontal reinforcement rib on an outer wall of an elongated main body portion.

9. Turning to what I understand to be the so-called "secondary considerations of non-obviousness," Tuf-Tite continues to sell tees made in accordance with the claims of the subject patent application, which are sold under the trade name "T-BAFFLE," and under Tuf-Tite's product number "TB-4." Attached as Appendix A to this Supplemental Affidavit is a sales report entitled "Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK," which is a true and accurate thirty-six month record of the sales volume for the T-BAFFLE tees sold by Tuf-Tite covering the time period from August 1, 2000 through July 31, 2003. During this time period, Tuf-Tite sold a total of 157,826 T-BAFFLE tees. Only a very small portion of the tees listed in Appendix A, less than 1%, were tees provided as free samples to customers. Thus, the vast majority of such listed quantities, over 99%, represent actual sales of Tuf-Tite TB-4 T-Baffle tees.

10. The sales volume for the twelve month period of August 1, 2000 through July 31, 2001 was 48,697 units, the sales volume for the period of August 1, 2001 through July 31, 2002 was 49,147 units, and Tuf-Tite's strongest twelve month period of sales yet for the T-Baffle was August 1, 2002 through July 31, 2003, specifically 59,982 T-Baffle tee units, including 8,710 in May, 2003, representing the largest single month yet of T-Baffle sales. Only a very small percentage of the units listed in each of these three years, less than 1%, were free samples.

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11. Based on my some 20 years of inventive, research, development, sales, manufacturing, trade show, and marketing experience in the on-site waste disposal system component business, during which time I have personally experienced the introduction of products ranging from highly commercially successful to unsuccessful, the sales figures shown in Appendix A reflect a substantial commercial success for the T-BAFFLE tees.

12. Attached as Appendix B is a listing, sorted by quantity, of sales on a state-by-state basis of TB-4 T-BAFFLE tees to various states. This listing is titled "Item Sales by State Code" and is captioned "Part by State" "TB-4".

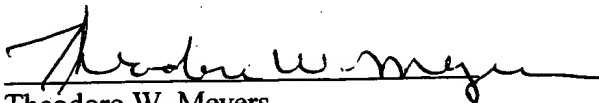
13. As demonstrated by the listing attached as Appendix B, in many states, such as California, Georgia, Maine, Arizona, Michigan, Ohio, and Missouri, Tuf-Tite realized rapid growth of sales of T-BAFFLE tees in the past twelve month period (under the heading "Qty Mos 1-12"), as compared with sales during each of the preceding periods. Further, the sales in those states continued to grow in each successive twelve month period. At least some of this growth is believed to be attributable to regulatory approvals finally occurring in certain counties or municipalities of such states, before which time precasters and installers of septic tanks and other on-site waste facilities that employ tees and filters were unwilling or unable to use T-BAFFLE tees in their jurisdictions.

14. Attached as Appendix C is a sales history listing, for customer ZIN1, which is Zabel Environmental Technology, a/k/a Zabel, Inc. ("Zabel"). This listing confirms that since the report attached as Appendix 2 to my Affidavit of November 26, 2002, Tuf-Tite still has not sent ~~any T-BAFFLE tees to Zabel since May 18, 2001.~~ As indicated in Appendix 2 to my original Affidavit, that May 18, 2001 shipment to Zabel was a free sample tee provided in an unsuccessful effort to re-gain Zabel's business with respect to the T-BAFFLE tee. Tuf-Tite has not sold any T-BAFFLE tees to Zabel since December 20, 2000. As indicated in Appendix C, Zabel continues to purchase various products from Tuf-Tite other than the T-BAFFLE tee.

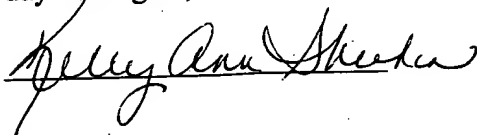
15. I hereby affirm that all of the foregoing statements are true and accurate to the best of my knowledge and belief, that each of the documents appended hereto are true and accurate copies of what they purport to represent, and that I am aware any false statements may subject

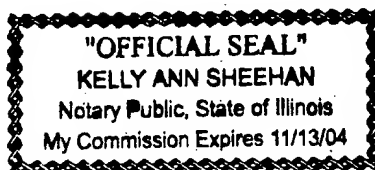
me to penalties for perjury and may jeopardize the validity of any patent(s) that may issue on the present application.

August 6<sup>th</sup>, 2003

  
Theodore W. Meyers  
Inventor & President,  
Tuf-Tite, Inc.

Subscribed and sworn to before me on this 6<sup>th</sup>  
day of August, 2003





Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK

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Pds Past	End Date		Qty	Sls
36	08/31/00		3,096	
35	09/30/00		5,639	
34	10/31/00		2,602	
33	11/30/00		5,981	
32	12/29/00		6,907	
31	01/31/01		4,145	
30	02/28/01		1,477	
29	03/30/01	REDACTED	2,601	REDACTED
28	04/30/01		3,025	
27	05/31/01		5,695	
26	06/29/01		3,634	
25	07/31/01		3,895	

Totals (36-25)	48,697
Avg. (36-25)	4,058.08

24	08/31/01	3,729
23	09/28/01	3,373
22	10/31/01	3,198
21	11/30/01	3,225
20	12/31/01	3,216
19	01/31/02	4,277
18	02/28/02	3,330
17	03/29/02	2,975
16	04/30/02	4,820
15	05/31/02	5,926
14	06/28/02	4,522
13	07/31/02	6,556

Totals (24-13)	49,147
Avg. (24-13)	4,095.58

12	08/30/02	5,885
11	09/30/02	5,107
10	10/31/02	6,357
9	11/30/02	3,429
8	12/31/02	3,453
7	01/31/03	2,939
6	02/28/03	3,175
5	03/31/03	3,050
4	04/30/03	4,847
3	05/30/03	8,710
2	06/30/03	5,285
1	07/31/03	7,745

Totals (12- 1)	59,982
Avg. (12- 1)	4,998.50

8/1/2003



Parts - U.S.		Part by State		
TB-4				
State	Qty Mos 37-48	Qty Mos 25-36	Qty Mos 13-24	Qty Mos 1-12
CA	693	5,111	7,722	10,176
NC	1,958	8,203	5,542	7,192
GA	139	70	4,804	7,181
NJ	887	4,202	4,491	4,884
ME	16	17	662	3,397
AZ	2	779	1,680	2,709
IN	518	620	2,390	2,353
CT	1,555	4,141	3,122	2,276
HI	288	793	1,724	1,984
NH	257	1,539	1,510	1,943
NY	397	1,977	2,289	1,917
OH	19	476	1,246	1,907
MD	360	759	1,292	1,488
IA	334	1,421	1,895	1,384
MO	18	50	989	1,227
VT	0	812	1,577	1,145
WV	106	1,321	1,322	1,142
MN	3	216	490	669
MT	32	4	469	639
IL	108	359	398	566
ID	17	9	778	495
	15	0	1	385
MA	69	137	58	355
VA	73	75	130	336

File Edit Window Help				
Item Sales by State Code				
Parts - U.S.		Part by State		
TB 4				
State	Qty Mos 37-48	Qty Mos 25-36	Qty Mos 13-24	Qty Mos 1-12
DE	0	1	32	317
OR	866	2,733	196	301
KY	2,885	11,211	51	269
AR	259	87	789	260
FL	1,037	212	518	199
WI	0	3	10	187
PA	19	93	268	159
TX	30	189	168	139
LA	10	32	56	106
RI	390	692	81	105
WA	1	34	163	82
NH	0	1	1	68
CO	8	8	16	40
AL	2	21	61	29
OK	0	3	15	16
WY	2	1	1	15
NV	0	1	9	8
SC	1	0	6	4
TN	0	17	1	3
UT	0	0	21	1
NE	2	17	6	1
KS	0	11	4	0

						Code
Lookup	Name/Address	Invoices/Orders	Notes	History	Picture	
ZABEL ENVIRONMENTAL TECHNOLOGY						
Item	Last Sale Dt	Item Description	Mo. 37-48	Mo. 25-36	Mo. 13-24	Mo. 1-12
SL-4	07/29/2003	4" SPEED LEVELER	600	2,050	4,700	3,000
DBO6	06/12/2003	6" DROP BOX-OUTLET DRO	0	0	336	400
IHD2	07/29/2003	4 HOLE DISTRIBUTION BOX	60	324	485	300
IHD2	06/12/2003	6 HOLE DISTRIBUTION BOX	60	180	473	200
IHD2	08/15/2002	9 HOLE DISTRIBUTION BOX	55	0	60	50
TB-4	05/18/2001	T-BAFFLE FOR SEPTIC TANK	2,881	11,161	0	0

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

APPLICANT: Theodore W. Meyers )  
 )  
APPLICATION NO.: 09/652,927 )  
 ) EXAMINER: Lugo  
FILED: August 31, 2000 )  
 ) ART UNIT: 3676  
FOR: TEE BAFFLE FOR USE AT )  
INLET OR OUTLET OF SEPTIC )  
AND OTHER ON-SITE WASTE )  
DISPOSAL SYSTEMS )  
 )

**THIRD AFFIDAVIT OF THEODORE W. MEYERS UNDER 37 CFR §1.132**

I, Theodore W. Meyers, hereby swear as follows:

1. I am the founder and President of Tuf-Tite, Inc. ("Tuf-Tite"), the Assignee of United States Patent Application No. 09/652,927, entitled "TEE BAFFLE FOR USE AT THE INLET OR OUTLET OF SEPTIC AND OTHER ON-SITE WASTE SYSTEMS," and I am also the sole inventor thereof.
2. I have reviewed the Office Action mailed October 20, 2004, and the prior art references on which the rejections under 35 U.S.C. §§ 102, 103 are based.
3. One purpose of this Third Affidavit is to respond to arguments raised in the Office Action mailed October 20, 2004 that my previous two Affidavits in this application were not considered persuasive. Another purpose of this Third Affidavit is to present yet additional consistent evidence of secondary considerations of non-obviousness which, by itself or in combination with the evidence of non-obviousness submitted with my November 26, 2002 and August 6, 2003 Affidavits, is more than sufficient to rebut the obviousness rejections under 35 U.S.C. § 103 of claims 2, 6, 15-18, and 20-22 in the Office Action mailed October 20, 2004.

**Additional Evidence of Secondary Considerations of Non-Obviousness**

**- Commercial Success**

4. Since August 1, 2003, which is the date of the sales history report attached to my Supplemental Affidavit of August 6, 2003, sales of TB-4 T-Baffle tees have continued to accelerate.

5. Attached at Tab 1 to this Third Affidavit is a sales report entitled "Sales History for TB-4, T-BAFFLE FOR SEPTIC TANK," which is a true and accurate thirty-six month record of the sales volume for the TB-4 T-Baffle tees sold by Tuf-Tite covering the time period from March 1, 2002 through February 28, 2005.

6. As indicated in the sales report attached at Exhibit A of my August 6, 2003 Supplemental Affidavit, during the time period from March 1, 2001 through February 28, 2002, Tuf-Tite sold a total of 43,198 TB-4 T-Baffle tees. As indicated in the sales report attached at Tab 1, during the time period from March 1, 2002 through February 28, 2003, Tuf-Tite sold a total of 55,144 TB-4 T-Baffle tees; during the time period from March 1, 2003 through February 27, 2004, Tuf-Tite sold a total of 67,638 TB-4 T-Baffle tees; and during the time period from March 1, 2004 through February 28, 2005, Tuf-Tite sold a total of 99,531 TB-4 T-Baffle tees, for a total during the forty-eight month period from March 1, 2001 through February 28, 2005 of 265,511 TB-4 T-Baffle tees. A very small percentage of these tees, less than 1%, were free samples.

7. Attached at Tab 2 to this Affidavit is a bar chart graphically depicting the dramatic increase in sales of the TB-4 T-Baffle tees in the years 2001-2004, based on the sales data shown in Exhibit A of my Supplemental Affidavit of August 6, 2003 and Tab 1 of this Affidavit.

8. As independent products, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are all covered by at least claims 2, 6, 15, 16, 21 and 22 of the present patent application.

9. When used in conjunction with effluent filters, such as the Tuf-Tite EF-4 effluent filter, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are additionally covered by claims 16 and 20.

10. When used in combination with a length of pipe received in the inlet/outlet hub, such as a pipe that may carry effluent away from a septic tank and out toward a leach field, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented in the sales reports attached to this and my prior Affidavits in this application are covered by claim 17.

11. When used in combination with a reducer bushing between the inlet/outlet hub and a length of pipe received in the inlet/outlet hub, in addition to at least claims 2, 6, 15, 16, 21 and 22, the TB-4 T-Baffle tees represented by the sales reports attached to this and my prior Affidavits in this application are covered by claim 18.

12. Attached at Tab 3 to this Affidavit is a sales report entitled "Sales History for EF-4, 4" Effluent Filter," which is a true and accurate thirty-six month record of the sales volume for the EF-4 effluent filter sold by Tuf-Tite covering the time period from March 1, 2002 through February 28, 2005. A very small percentage of these effluent filters, less than 1%, were free samples.

13. Attached at Tab 4 to this Affidavit is a sales report entitled "Sales History for EF-4, 4" EFFLUENT FILTER", which is a true and accurate fourteen-month record of the sales volume for the EF-4 effluent filter sold by Tuf-Tite covering the time period from January 1,

2001 through February 28, 2002. A very small percentage of these effluent filters, less than 1%, were free samples.

14. The EF-4 effluent filter, which is the subject of my U.S. Patent Nos. D431,629 and 6,319,403 (which patents are assigned to Tuf-Tite) is intended for use in the TB-4 T-Baffle tee.

15. It would have been my expectation that sales growth of the EF-4 effluent filter would have tracked closely with sales growth of the TB-4 T-Baffle tee.

16. Because TB-4 T-Baffle tees may be used at the inlet or outlet of a septic tank, and the EF-4 effluent filter is used only at the outlet of septic tanks, it would have been my expectation that, at most, sales of the TB-4 T-Baffle tees in a particular year would be double sales of EF-4 effluent filters.

17. Attached at Tab 5 to this Affidavit is a bar chart graphically depicting a comparison between the accelerating sales of the TB-4 T-Baffle tees from March 1, 2001 to February 28, 2005, with the relatively linear growth of sales of the EF-4 effluent filters in the same time period.

18. Contrary to my expectations, as depicted in the bar chart at Tab 5, sales of the TB-4 T-Baffle tees have increased at a much faster rate than sales of the EF-4 effluent filter.

19. Also contrary to my expectations, as depicted in the bar chart at Tab 5, in the period from March 1, 2004-February 28, 2005, sales of the TB-4 T-Baffle tees were substantially more than double sales of the EF-4 effluent filter. Specifically, 39,295 EF-4 effluent filters, as compared to 99,531 TB-4 T-Baffle tees.

20. The strong sales of the TB-4 T-Baffle tees are due to the claimed features of the tee, including: a wall thickness between 0.075" and 0.100" over a substantial portion of an

elongated generally cylindrical main body portion; an inlet/outlet hub of an inlet/outlet port, such inlet/outlet hub having a diameter sized to receive a pipe of a first outer diameter (e.g., Schedule 40 pipe) and being adaptable to receive a pipe of a second outer diameter (e.g., SDR-35 pipe), and the diameter of the inlet/outlet hub being greater than the diameter of the elongated main body portion.

21. I know of no other reason, except for the claimed features noted above and the cost savings realized by those claimed features which are passed along to customers, to account for such dramatic sales. For example, the TB-4 T-Baffle tees have not been advertised or marketed in a manner, or at any level, differently from any of the numerous other on-site waste system and related component products sold by Tuf-Tite. Based upon my experience in the industry, including as to marketing and advertising by Tuf-Tite and by others, it is my view that the level of marketing and advertising spent on the TB-4 T-Baffle tees since their introduction would not generate the growth and level of sales experienced in 2001-2004.

22. I have read in the Office Action mailed October 20, 2004 the statements that "the applicant fails to explain why the sales increase. Also, the applicant fails to demonstrate his invention with respect to the devices that are in the market."

23. As I best understand these statements, there is an alleged shortcoming in my prior Affidavits in this application on the basis that I have not sufficiently shown how the increase in sales of the Tuf-Tite TB-4 T-Baffle tees compares to sales of other products in the market. However, when one considers the types of products that the TB-4 T-Baffle tee replaces, it is readily appreciated that data concerning sales of such other products would not be useful to demonstrate the remarkable commercial success of the TB-4 T-Baffle tee. More specifically, as discussed in the "Background" section of my present patent application, "[o]lder concrete septic



systems utilized cast-in concrete baffles at the inlet and outlet of the system.” (P. 1). An alternative has been the use of “standard tees or sweep tees manufactured *primarily* for use in plumbing applications, such as for pipe joints or couplings.... [and] a length of PVC pipe cut down to fit one end of the available plumbing tees, and of sufficient length to cover the sealing gasket used with many of the known single-pass effluent filters.” (Pp. 2, 4) (emphasis added).

24. Even if sales data from the period 2001-2004 for such conventional cast-in concrete baffles, plumbing tees, and lengths of PVC pipe were available, these products have such a myriad of uses in plumbing and other fields, other than at the inlet or outlet of septic tank systems, that a comparison of sales with the Tuf-Tite TB-4 T-Baffle tees would, respectfully, be meaningless and not helpful toward determining whether there has been commercial success of the Tuf-Tite TB-4 T-Baffle.

25. What is remarkable about the sales growth of the Tuf-Tite TB-4 T-Baffle tee has been the widespread and ever-growing acceptance and interest in the Tuf-Tite TB-4 T-Baffle tee, i.e. as a low-cost, labor-saving, quickly-installed alternative to products or structures that are primarily intended for other purposes, but which nevertheless had been the standard for housing effluent filters used at the outlet of septic tanks or for directing flow of wastewater into septic tanks at the inlet.

- Copying By Others

26. My previous affidavits presented evidence of copying of the patentable and claimed features of the TB-4 T-Baffle tee by Zabel, Inc., a competitor of Tuf-Tite.

27. Since Tuf-Tite’s introduction of the TB-4 T-Baffle tee, another competitor of Tuf-Tite has introduced a filter housing which incorporates many of the claimed features of the tee baffle of my present patent application.

28. Attached at Tab 6 is an excerpt of the 2005 catalog of Polylok, Inc. ("Polylok"), advertising a housing for use at the inlet or outlet of septic tanks, and the cover of that 2005 catalog.

29. On page 68 of the Polylok 2005 catalog, in a graphic box containing a picture of the housing, is the following text:

**"NEW TEE/BAFFLE**

- Can be used on either inlet or outlet.
- Easy to install
- Accepts 3", 4", SCHD 40 and SDR 35 pipe
- Accepts most 4", effluent filters

**Patent Pending"**

30. Attached at Tab 7 is a series of digital photos of the Polylok, Inc. housing, which is designated the "PL-68 tee", and which is available as Part No. 30142-68.

31. The Polylok PL-68 tee is a tee for use at the inlet or outlet of a septic tank.

32. The Polylok PL-68 tee has an elongated, generally cylindrical injection molded plastic main body portion defining a tubular opening, and the tubular opening is adapted to receive a filter.

33. The Polylok PL-68 tee has a cylindrical injection molded plastic uppermost hub coaxial with the elongated main body portion, and the uppermost hub has an inner diameter greater than the diameter of the elongated main body portion.

34. The Polylok PL-68 tee has an inlet/outlet port in communication with the tubular opening, the inlet/outlet port having an inlet/outlet hub at an open end thereof, and the inlet/outlet hub has a diameter sized so as to receive a pipe of a first outer diameter.

35. The inlet/outlet hub of the Polylok PL-68 tee is also adapted to receive a pipe of a second outer diameter, by virtue of an integral nested cylindrical portion extending coaxially with, and located within, the inlet/outlet hub.

36. The diameter of the inlet/outlet hub of the Polylok PL-68 tee is greater than the diameter of the elongated main body portion.

37. Polylok, Inc. did not develop the Polylok PL-68 tee until long after Tuf-Tite released the TB-4 Tee Baffle.

38. Sometime after December 20, 2000, but before Polylok released the Polylok PL-68 tee, Polylok expressed interest to Tuf-Tite in purchasing large quantities of TB-4 T-Baffle tees from Tuf-Tite, but Tuf-Tite was not willing to sell large quantities of TB-4 T-Baffle tees to its competitor.

39. Tuf-Tite has still not sold any T-Baffle tees to Zabel, Inc. since December 20, 2000.

#### Conclusion

40. The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under the laws of the United States of America, and that such willful false statements and the like may jeopardize the validity of the application or of any patent(s) resulting therefrom, declares that all statements made of his knowledge are true; that all statements made on information and belief are believed to be true, and that each of the attached documents is a true and accurate copy of what it purports to represent.

March 21, 2005

/Theodore W. Meyers/  
Theodore W. Meyers  
Inventor & President,  
Tuf-Tite, Inc.

ales History for TB-4, T-BAFFLE FOR SEPTIC TANK

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is Past	End Date		Qty	Sls
36	03/29/02		2,975	
35	04/30/02		4,820	
34	05/31/02		5,926	
33	06/28/02		4,522	
32	07/31/02		6,556	
31	08/30/02		5,885	
30	09/30/02		5,107	
29	10/31/02	REDACTED	6,357	REDACTED
28	11/30/02		3,429	
27	12/31/02		3,453	
26	01/31/03		2,939	
25	02/28/03		3,175	
Totals (36-25)			55,144	
Avgs. (36-25)			4,595.33	
24	03/31/03		3,050	
23	04/30/03		4,847	
22	05/30/03		8,710	
21	06/30/03		5,285	
20	07/31/03		7,745	
19	08/29/03		6,144	
18	09/30/03		7,802	
17	10/31/03		7,603	
16	11/26/03		5,266	
15	12/31/03		3,654	
14	01/30/04		4,355	
13	02/27/04		3,177	
Totals (24-13)			67,638	
Avgs. (24-13)			5,636.50	
12	03/31/04		8,451	
11	04/30/04		7,085	
10	05/28/04		9,242	
9	06/30/04		8,749	
8	07/30/04		11,696	
7	08/31/04		9,354	
6	09/30/04		8,696	
5	10/31/04		7,809	
4	11/30/04		8,599	
3	12/30/04		8,265	
2	01/31/05		5,992	
1	02/28/05		5,593	
Totals (12- 1)			99,531	
Avgs. (12- 1)			8,294.25	
Totals (36- 1)			222,313	
Avgs. (36- 1)			6,175.36	

# Sales History for EF-4, 4" EFFLUENT FILTER

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Pds Past	End Date	Qty	Sls
36	03/29/02	1,740	
35	04/30/02	2,183	
34	05/31/02	3,238	
33	06/28/02	1,784	
32	07/31/02	3,023	
31	08/30/02	3,221	
30	09/30/02	2,519	
29	10/31/02	2,841	
28	11/30/02	1,293	
27	12/31/02	1,986	
26	01/31/03	1,993	
25	02/28/03	1,427	
Totals (36-25)		27,248	
Avgs. (36-25)		2,270.67	
24	03/31/03	1,791	
23	04/30/03	3,265	
22	05/30/03	4,797	
21	06/30/03	2,644	
20	07/31/03	3,350	
19	08/29/03	3,285	
18	09/30/03	3,748	
17	10/31/03	3,851	
16	11/26/03	2,147	
15	12/31/03	2,564	
14	01/30/04	2,260	
13	02/27/04	1,352	
Totals (24-13)		35,054	
Avgs. (24-13)		2,921.17	
12	03/31/04	3,877	
11	04/30/04	3,422	
10	05/28/04	3,602	
9	06/30/04	2,842	
8	07/30/04	3,095	
7	08/31/04	4,307	
6	09/30/04	4,022	
5	10/31/04	3,284	
4	11/30/04	4,058	
3	12/30/04	2,566	
2	01/31/05	2,907	
1	02/28/05	1,313	
Totals (12- 1)		39,295	
Avgs. (12- 1)		3,274.58	
Totals (36- 1)		101,597	
Avgs. (36- 1)		2,822.14	

Sales History for EF-F, 4" EFFLUENT FILTER

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Pds Past	End Date		Qty Sales	
50	01/31/01		2,350	
49	02/28/01		1,701	
48	03/31/01	REDACTED	1,221	REDACTED
47	04/30/01		1,738	
46	05/31/01		3,449	
45	06/30/01		1,246	
44	07/31/01		2,402	
43	08/31/01		2,610	
42	09/30/01		1,774	
41	10/31/01		1,007	
40	11/30/01		1,759	
39	12/31/01		1,161	
38	01/31/02		1,860	
37	02/28/02		2,056	

**(L) DRAWINGS APPENDIX**

L-I – Figure 2 of Application No. 09/652,927 (application on appeal)

L-II – Figure 1 of Application No. 09/652,927 (application on appeal)

L-III – Figure 1 of Ramm, U.S. Patent No. 3,633,943

FIG. 2

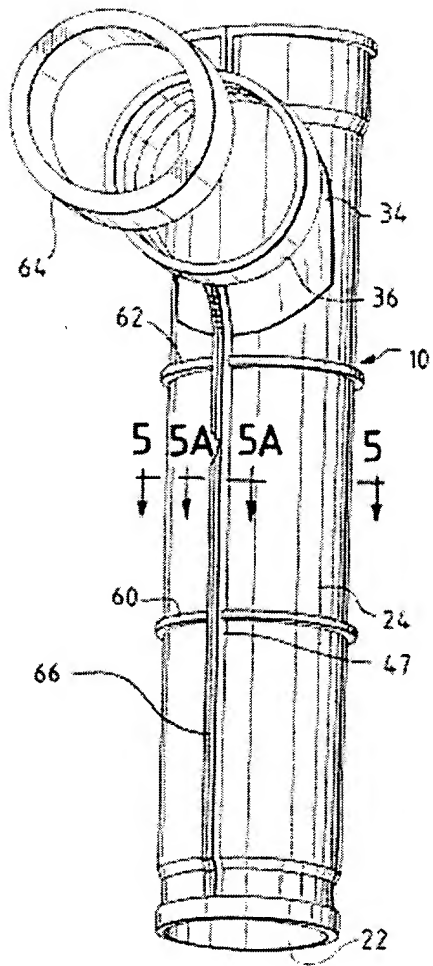
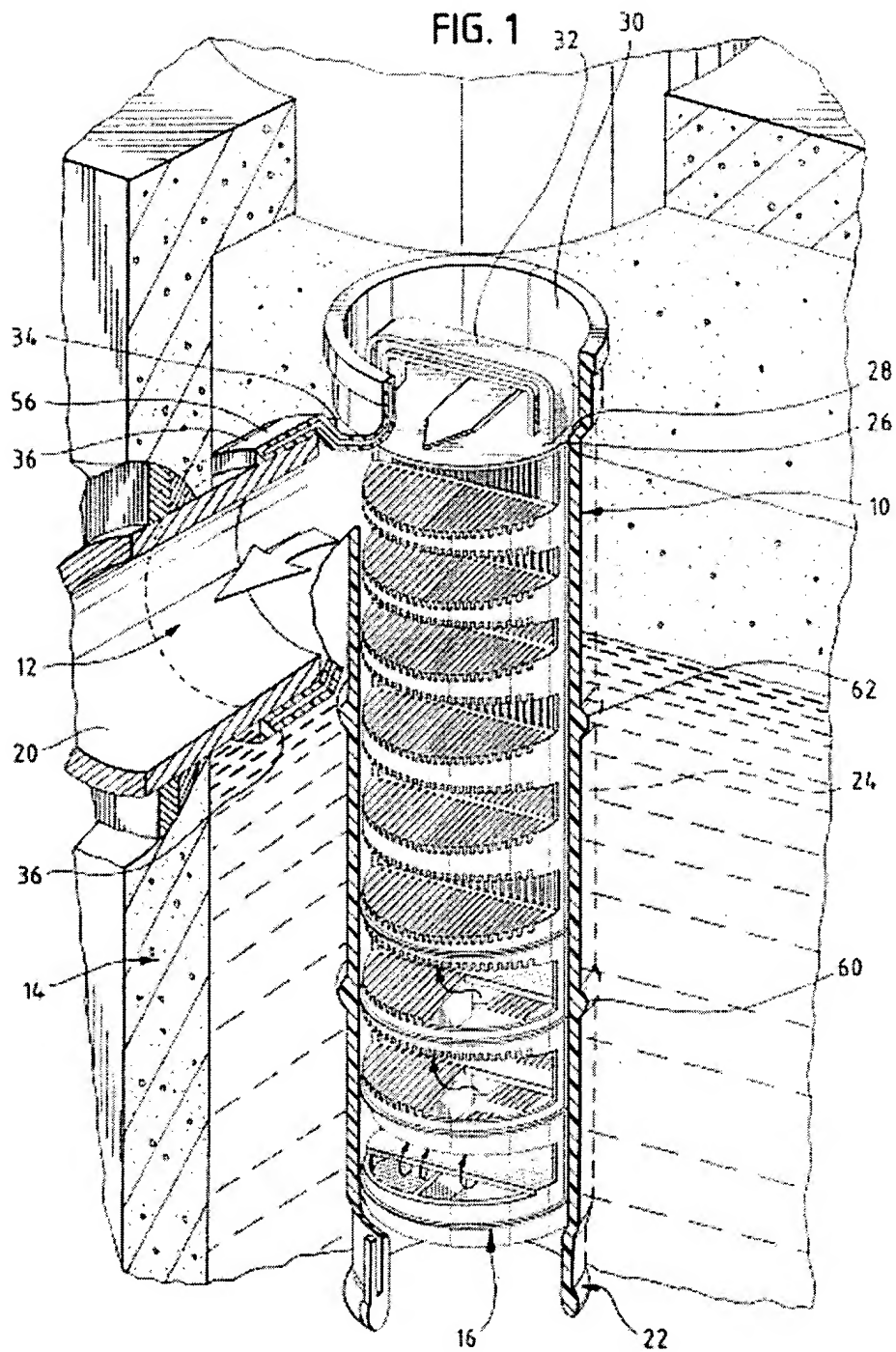




FIG. 1



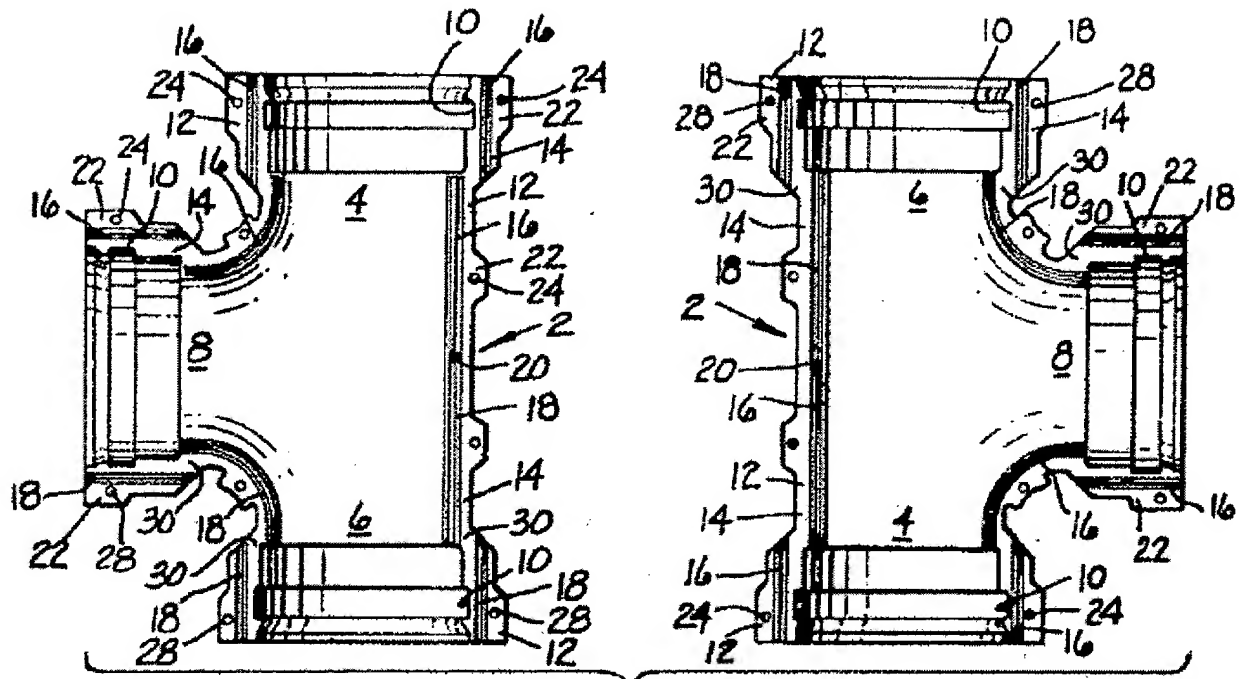


Fig. 1.

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